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ARMADA (SINGAPORE) PTE LTD v. ASHAPURA MINECHEM LTD

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[ORIGINATING SUMMONS NO: 24NCC-460-12-2012]
B 8 JULY 2016

ARBITRATION: *Award of arbitrator – Enforcement and validity – Application to set aside order granting leave to enforce arbitration award – Omission to include indorsement under O. 69 r. 8(8) Rules of Court 2012 – Whether nullified award*
C *– Whether defendant prejudiced by lack of indorsement or statement – Whether erroneous of defendant to invoke O. 67 r. 9 Rules of Court 2012 – Whether Reciprocal Enforcement of Judgments Act 1958 applicable – Whether there was inordinate delay in filing application – Whether plaintiff's application to amend sealed order to include a notice pursuant to O. 69 r. 8(8) Rules of Court 2012 allowed*

D ***ARBITRATION:*** *Award of arbitrator – Enforcement and validity – Application to set aside order granting leave to enforce arbitration award – Issue of novation – Whether an issue of merits – Whether relevant to court in determining whether to allow enforcement of an arbitration award – Proper place to challenge validity of arbitration award – Whether at seat of arbitration and not at enforcement court*

E

The plaintiff and the defendant entered into a contract of affreightment ('COA 2008'). Some months later, the defendant wrote to the plaintiff alleging that the COA 2008 was terminated due to force majeure event. Pursuant to cl. 28 of the COA 2008, the plaintiff appointed an arbitrator for the dispute. On 16 January 2010, an arbitration award was granted in favour
F of the plaintiff and was subsequently served on the defendant's registered address. The plaintiff thus commenced an originating summons to enforce the arbitration award. There were two applications before the court. One was a notice of application (defendant's application) (encl. 25) made pursuant to O. 67 r. 9 and O. 69 rr. 8 and 9 of the Rules of Court 2012 ('ROC 2012')
G and ss. 2 and 5 of the Reciprocal Enforcement of Judgments Act 1958 ('REJA') wherein the defendant sought to set aside the *ex parte* order of the court dated 16 January 2014 granting leave to enforce the arbitration award dated 16 January 2010 and to recognise the award as binding and enforceable against the defendant ('16 January 2014 order'). The other application was
H a notice of application wherein the plaintiff ('plaintiff's application') sought to amend the sealed order dated 16 January 2014 to include a notice pursuant to O. 69 r. 8(8) ROC 2012 as per the proposed amended order (encl. 39). The defendant's application to set aside 16 January 2014 order were premised on these grounds (a) 16 January 2014 order failed to contain a
I statement of the defendant's right to make an application to set aside the said order; (b) 16 January 2014 order failed to contain a notification that the execution of the 2010 arbitration award would not issue until after the expiration of that period; and (c) with the notice of novation dated

5 December 2008, the plaintiff no longer had any status in the 2008 affreightment, thus the plaintiff was not a proper party to the arbitration proceeding and this proceeding. The plaintiff opposed the defendant's application on the grounds, *inter alia*, that (i) the defendant's application ought to be dismissed *in limine* for being filed after an inordinate delay without good reasons; (ii) whether there was any basis to suggest the plaintiff was not a proper party by reason of the notice of novation when novation novated liability and not assigned rights; and (iii) whether there was any prejudice caused to the defendant for lack of the indorsement and/or statements in the form of 16 January 2014 order.

Held (dismissing defendant's application with costs; allowing plaintiff's application to amend sealed order):

(1) It was erroneous of the defendant to have invoked O. 67 r. 9 of the ROC 2012 and ss. 2 & 5 of REJA as 16 January 2014 order was procured by the plaintiff under the provisions of s. 38 of the Arbitration Act 2005 ('AA 2005') read with O. 69 r. 8 of ROC 2012. In light of the non-applicability of REJA in the setting aside of 16 January 2014 order, there was no requirement for a notice of registration and indorsement of service on the affidavit proving service as it was a requirement under O. 67 r. 10 ROC. There was also no requirement for a notification that the execution of the award would not issue until the expiration of the period as it was a requirement under O. 67 r. 5(2) of the ROC. (paras 14 & 15)

(2) The omission to include the indorsement under O. 69 r. 8(8) of the ROC 2012 did not nullify the 2010 award. The cause papers *ie*, the OS and the affidavit in support of the leave application to enforce the 2010 award were affirmed and were in order. Non-compliance of procedural requirements should not be treated as invalidating an action or other proceedings or steps taken therein unless it occasioned a substantial miscarriage of justice. Further, a comparison can be drawn with penal indorsements where the penal indorsement that the respondent was liable to process of execution would sometimes be included in the drawing up of the order but sometimes omitted; however the omission was not fatal as the drawn up order could be amended to include the penal indorsement (*Tan Bee Ang v. Siew Chee Choong*). (paras 20-22)

(3) The defendant's reason for the inordinate delay in filing his application being lack of finance could not constitute a valid and justifiable reason for the defendant not to seek legal recourse within the stipulated time. There was no prejudice caused to the defendant: given the factual circumstances, the absence of the indorsement under O. 69 r. 8(8) of the ROC 2012 would not matter anyway as the defendant could not incur any such costs to set aside the 16 January 2014 order. (para 29)

(4) The issue of novation requires various findings such as whether there was a novation in the form of extinguishing the old contract, and substituting a new contract. Novation merely involves transfer of a debt, and not an assignment of rights. The issue of novation was, if at all, an issue of merits. Matters going into merits of the arbitration award are strictly of no relevance to the court in determining whether to allow enforcement of an arbitration award. The proper place to challenge the validity of the arbitration award should be at the seat of arbitration *ie*, the English court who was the supervisory court rather than in this court who was merely an enforcement court. Furthermore, the defendant would be estopped to argue this point, having chosen not to participate in the arbitration proceedings and all the other proceedings. (para 33)

Case(s) referred to:

Abdul Latif Mohamed Ibrahim v. International Factors Leasing Pte Ltd [2001] 2 CLJ 140 CA ***(dist)***

Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd [2010] 1 CLJ 137 FC ***(refd)***

Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd [2003] 3 CLJ 791 CA ***(dist)***

Murray & Roberts Australia Pty Ltd v. Earth Support Company (SEA) Sdn Bhd [2015] 6 CLJ 649 HC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 CA ***(refd)***

Pasukhas Constructions Sdn Bhd & Anor v. MTM Millenium Holdings Sdn Bhd [2015] 1 LNS 591 HC ***(refd)***

Puncak Alam Housing Sdn Bhd v. Menta Construction Sdn Bhd & Anor [2013] 1 LNS 148 CA ***(refd)***

Re Raju Jayaraman Kerpaya ex p Associated Asian Securities (Pte) Ltd [1999] 5 CLJ 23 HC ***(refd)***

Saeed U Khan v. Lee Kok Hooi [2000] 7 CLJ 454 HC ***(dist)***

State Government of Sarawak v. Chin Hwa Engineering Development Co [1995] 4 CLJ 1 SC ***(refd)***

Tan Bee Ang v. Siew Chee Choong [2011] 1 LNS 121 HC ***(refd)***

Velantham Chettiar v. Sayampanathan [1929] SSLR 98 ***(refd)***

Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur & Anor [1998] 1 CLJ 395 HC ***(dist)***

Legislation referred to:

Arbitration Act 2005, ss. 38, 39(1)(a)(iv), (v), (b)(ii)

Reciprocal Enforcement of Judgments Act 1958, ss. 2, 5

Rules of Court 2012, O. 32 r. 13(2)(c), O. 42 r. 13, O. 67 rr. 1, 5(2), 9, 10, O. 69 rr. 8(1), (7), (8), 9

For the plaintiff - Kumar Kanagasingam, Wong Te Jie & Ang Hean Leng; M/s Lee Hishammuddin Allen & Gledhill

For the defendant - Ang Lay Ling; M/s Rahayu Partnership

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

Background

[1] There are two applications before the court. One is a notice of application dated 22 July 2015 ('the defendant's application') (encl. 25) made pursuant to O. 67 r. 9 and O. 69 rr. 8 and 9 of the Rules of Court 2012 ('ROC 2012') and ss. 2 and 5 of the Reciprocal Enforcement of Judgments Act 1958 (Act 99) ('REJA') wherein the defendant seeks to set aside the *ex parte* order of the court dated 16 January 2014 granting leave to enforce the arbitration award dated 16 January 2010 and to recognise the award as binding and enforceable against the defendant ('16 January 2014 order').

[2] The other application is a notice of application dated 3 November 2015 wherein the plaintiff ('plaintiff's application') seeks to amend the sealed order dated 16 January 2014 to include a notice pursuant to O. 69 r. 8(8) of the ROC 2012 as per the proposed amended order as per Appendix A annexed to the plaintiff's application (encl. 39).

[3] It is on record that learned counsel for the defendant, Miss Ang Lay Ling agreed with the statement of Mr Kumar Kanagasingam, learned lead counsel for the plaintiff that the defendant's application ought to be heard first as if the setting aside of the 16 January 2014 order is allowed, the amendment application will be rendered redundant.

[4] The defendant's application is supported by the affidavit in support affirmed by Nilamadhaba Rath on 21 July 2015 (encl. 26) and is opposed by the plaintiff's affidavit in reply affirmed by Terrence Chin Khee Loon on 21 August 2015 (encl. 27). Thereafter the defendant replied by the defendant's affidavit in reply affirmed by the same deponent, on 11 September 2015 (encl. 29) and which was responded to by the plaintiff affirmed by the same deponent *vide* the plaintiff's affidavit in reply affirmed by the same deponent, Terrence Chin Khee Loon on 1 October 2015 (encl. 30) ('plaintiff's second affidavit in reply').

[5] Upon a consideration of the written submissions and the oral submissions of both counsel for the defendant and the plaintiff, I dismissed the defendant's application (encl. 25) with costs of RM10,000 and allowed the plaintiff's application (encl. 39) with no order as to costs. The defendant has appealed. The reasons for my decision are stated below.

Findings

Preliminary Objection

[6] The defendant raised a preliminary objection to the plaintiff's second affidavit in reply that it ought to be expunged as (i) the defendant had on 5 October 2015 *vide* its solicitors' letter of even date given notice to the plaintiff's solicitors of the defendant's intention to raise the PO in respect of

the plaintiff's second affidavit in reply, (ii) the defendant received the plaintiff's second affidavit in reply on 2 October 2015 (Friday) after 4.30pm, (iii) both parties were directed by the court to simultaneously file their respective main submission by 5 October 2015 and (iv) the defendant being a foreign company is greatly prejudiced as it has been deprived of the right to reply.

[7] The defendant relies on *Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd* [2003] 3 CLJ 791; [2003] 4 MLJ 409 (CA) at held 1:

> These proceedings were by way of affidavit evidence. When the parties began their submission, the admission of evidence by way of affidavit is deemed closed. Parties ought only to be allowed to submit on the evidence presented. It was a matter of some surprise that the trial judge allowed an affidavit to be filed after the close of the borrower's submissions. ...;

and *Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur & Anor* [1998] 1 CLJ 395 HC held 2:

> To allow the introduction of fresh evidence would be tantamount to a reopening of the case after the 1st respondent had completed its submission upon the evidence before the court. The affidavit of the 1st respondent must be expunged from the record.

[8] I observed from the minutes of the learned Senior Assistant Registrar ('SAR') during the case management on 14 September 2015, the defendant informed the court that it will be filing the defendant's affidavit in reply to the plaintiff's affidavit in reply by even date. The learned SAR then directed the parties to file main submission on or before by 5 October 2015 and the reply submission on or before 16 October 2015. Since these directions have been given by the court, it would have been prudent for the plaintiff to have written in to the court and draw to the court's attention that it needs to file a second affidavit in reply and seek further direction from the court given that the hearing date was fixed on 5 November 2015. This I believe could have circumvented the PO arising.

[9] Be that as it may, I will now address the merits of the PO. I am of the view the PO raised by the defendant has no merits and I dismissed the PO for following reasons:

(i) Order 32 r. 13(2)(c) of the ROC 2012 provides that "a party intending to reply to the affidavit served on him shall file his affidavit and serve it on the other party within 14 days from the date the affidavit he intends to reply was served on him". The plaintiff's second affidavit in reply was not filed after the close of submissions. The plaintiff's second affidavit in reply was filed on 2 October 2015 which is within the 14 days' period from the date the defendant's affidavit in reply was served on it (ie 14 September 2015), bearing in mind that 16 September 2015 (Malaysia Day) and 24 September 2015 (Hari Raya Haji) were public holidays.

(ii) *Lum Choon Realty* (*supra*) can be distinguished. The Court of Appeal in that case stated at p. 421 it was recorded that the affidavit in issue was done "after the appellant's counsel closed his submission" unlike the instant case where the plaintiff's second affidavit in reply was not filed after submission began but before.

(iii) *Yian Sdn Bhd* (*supra*) can be likewise distinguished as at p. 401 the affidavit in issue was filed after the first respondent had completed its case when its counsel had completed their submissions and it was too late in the day for the first respondent to adduce further evidence.

[10] It is not disputed that the plaintiff commenced the originating summons in 2012 seeking for leave to enforce the arbitration award obtained against the defendant in 2010 pursuant to a contract of affreightment dated 4 April 2008 ('COA 2008'). It is also not disputed that on 16 January 2014 this court granted order in terms of the plaintiff's application for leave to enforce and to recognise the arbitration award dated 16 February 2010. The defendant is seeking to set aside the 16 January 2014 order. The chronology of events with regard to the plaintiff's application to enforce the arbitration award as outlined by the plaintiff are:

4 April 2008	-	COA 2008 entered into between the plaintiff and the defendant.
30 September 2008	-	The defendant wrote to the plaintiff alleging that the COA 2008 was terminated due to force majeure event.
2 October 2008	-	The plaintiff responded to the defendant's letter above and denied the plaintiff's allegation.
4 November 2008	-	Pursuant to cl. 28 of the COA 2008, the plaintiff appointed an arbitrator – Mr Michael Baker Harber for the dispute.
1 May 2009	-	Notice of appointment of Mr Michael Baker Harber as an arbitrator for the plaintiff was issued to the defendant and the plaintiff had requested the defendant to appoint their arbitrator.
8 June 2009	-	Mr Michael Baker Harber appointed as sole arbitrator for the dispute and its appointment was accepted on the current terms of the London Maritime Arbitrators Association.
16 February 2010	-	2010 Arbitration Award granted in favour of the plaintiff.

23 March 2010	-	2010 Arbitration Award served on the defendant's registered address.
28 December 2012	-	The plaintiff's 2012 originating summons ("OS") to enforce the arbitration award filed.
3 January 2013	-	The plaintiff's notice of application for leave to serve the OS out of jurisdiction filed.
15 January 2003	-	The plaintiff's notice of application for leave granted.
11 February 2013	-	The OS, notice of application for leave and the sealed order dated 15 January 2013 served on the defendant.
8 May 2013	-	The plaintiff's notice of application to extend the validity of the OS filed.
10 May 2013	-	The plaintiff's notice of application to extend the validity of the OS granted.
8 June 2013	-	The renewed OS served on the defendant.
16 January 2014	-	The plaintiff granted leave to enforce the arbitration award – 16 January 2014 order.
24 February 2014	-	The sealed 16 January 2014 order served on the defendant.
22 July 2015	-	Defendant's application to set aside the 16 January 2014 order.

[11] The defendant's application to set aside the 16 January 2014 order is premised on these grounds:

(a) The 16 January 2014 order failed to contain a statement of the defendant's right to make an application to set aside the said order;

(b) The 16 January 2014 order failed to contain a notification that the execution of the 2010 Arbitration Award will not issue until after the expiration of that period; and

(c) With the notice of novation dated 5 December 2008, the plaintiff no longer has any status in the 2008 affreightment, thus the plaintiff is not a proper party to the arbitration proceeding and this proceeding.

[12] Summarily, the plaintiff opposed the defendant's application on the grounds:

(a) The defendant's application ought to be dismissed *in limine*:

(i) for not having firstly obtained an extension of time; and

(ii) in any event being filed after an inordinate delay of almost one and a half years and/or without good reasons. A

(b) Whether the court can take into account the substantive merits of the case such as the plaintiff not being a proper party to the arbitration proceeding by reason of notice of novation when such matters could have been raised but were not raised in the previous proceedings; B

(c) Whether the court can take into account matters which did not go into the determination of the granting of the 16 January 2014 order but are matters post granting of that order relevant to the form of the sealed order of the 16 January 2014 order such as the lack of the indorsement and/or statements in the form of the sealed 16 January 2014 order; C

(d) In any event whether there is:

(i) any basis to suggest the plaintiff was not a proper party by reason of the notice of novation when novation novates liability and not assign rights; D

(ii) there was any prejudice caused to the defendant for lack of the indorsement and/or statements in the form of the 16 January 2014 order.

[13] The defendant argued that: E

(i) Section 2 of the REJA, provides that the definition of "judgment" includes an arbitration award;

(ii) (O. 67 r. 1) of the ROC 2012 provides that the powers conferred on the High Court by (REJA), which is referred to as "the Act" in this order, may be exercised by a judge in chambers and the Registrar. F

(iii) By virtue of (O. 69 r. 9) of the (ROC 2012), the defendant submits that (O. 67 of the ROC 2012) and (REJA) should also be applicable to the registration of the arbitration award, particularly when (O. 69 of the ROC 2012) does not make any provision. G

[14] With respect I cannot agree with the defendant's argument. I agree with the plaintiff that it is erroneous of the defendant to have invoked O. 67 r. 9 of the ROC 2012 and ss. 2 and 5 of the REJA as the 16 January 2014 order was procured by the plaintiff under the provisions of s. 38 of the AA 2005 read with O. 69 r. 8 of the ROC 2012. H

[15] In the light of the non-applicability of REJA in the setting aside of the 16 January 2014 order, I am of the view there is:

(a) No requirement for a notice of registration and indorsement of service on the affidavit proving service as it is a requirement under O. 67 r. 10 of the ROC 2012; and I

(b) No requirement for a notification that the execution of the award will not issue until the expiration of the period as it is a requirement under O. 67 r. 5(2) of the ROC 2012.

[16] Order 69 r. 8(1) of the ROC 2012 provides:

> (1) An application for permission to enforce an award in the same manner as a judgment or an order may be made without notice in an arbitration claim originating summons.

[17] Order 69 r. 8(7) of the ROC 2012 provides:

> (7) Within fourteen days after service of the order giving permission to enforce the award or, if the order is to be served out of the jurisdiction, within such other period as the Court may set:
>
> (a) the respondent may apply to set aside such order; and
>
> (b) the award shall not be enforced until:
>
> (i) after the expiration of that period; or
>
> (ii) if the respondent applies within that period to set aside, until after the application made by the respondent has been finally disposed of.

[18] Order 69 r. 8(8) of the ROC 2012 provides:

> (8) The order giving permission for enforcement shall contain a statement of the right to make an application to set aside the order.

[19] The defendant argued that the usage of the word "shall" in sub-r. 8 of r. 8 of O. 69 is a mandatory requirement for the plaintiff to state the period within which the defendant may apply to set aside the 16 January 2014 order. To support its proposition, the defendant cited:

(a) *Re Raju Jayaraman Kerpaya ex p Associated Asian Securities (Pte) Ltd* [1999] 5 CLJ 23 held 1:

> ... The order must be drawn up and served on the judgment debtor. The order must state the period within which the judgment debtor may apply to set aside the registration. It must also contain a notification that execution will not issue until after expiration of that period. Further, a notice of such registration must be served on the judgment debtor followed by an endorsement by the person who serves it ... An affidavit of service should be filed and it must state the date on which the notice was endorsed. Then, the judgment debtor may apply to set aside the registration ...

(b) *Velantham Chettiar v. Sayampanathan* [1929] SSLR 98

> ... In my opinion this omission, in the original order, is a substantial defect because Rule 12 gives rights which are founded on the time allowed by the Court under Rule 6. No solicitor's note can supplement a Court order of this kind; and no time limit in fact has been named by the Court. I, therefore, set the order of 24th February, 1928 aside. The judgment creditor must make a fresh application and see that he gets the time limit under Rule 6 put into his order ...

[20] With respect in the circumstances of this case I am of the opinion that the omission to include the indorsement under O. 69 r. 8(8) of the ROC 2012 does not nullify the 2010 award. Firstly, I had examined the cause papers ie the OS dated 28 December 2012 (encl. 1) and the affidavit in support of the leave application to enforce the 2010 award affirmed by Andrew Grimmett on 27 December 2012 and as they were in order I granted the 16 January 2014 order.

[21] Secondly, in *Pasukhas Constructions Sdn Bhd & Anor v. MTM Millenium Holdings Sdn Bhd* [2015] 1 LNS 591, one of the grounds of the defendant in setting aside the *ex parte* order of the court obtained by the plaintiffs pursuant to an originating summons seeking to register and enforce the final award under s. 38 of the AA 2005 was it was irregular as amongst others it did not contain a statement of the right to make an application to set aside the order under O. 69 r. 8(8) of the ROC 2012. I had dismissed the defendant's application on this issue, for amongst others the following reason:

> (ii) Based on the line of high authority cited by the learned Counsel for the Plaintiffs, Mr. Gideon Tan, I am inclined to accept the Plaintiffs' argument that the consensus of the authorities suggest that the Court is more concerned "that the rights of parties in an action are not to be defeated by technical objections". This is particularly borne out from these 2 authorities:
>
> (aa) The Court of Appeal case of *Mokhtar Amin v. Mohamed Moktar Omar* [2001] 4 CLJ 489 where at 493-494, Gopal Sri Ram JCA held that the non-compliance of procedural requirements should not be treated as in invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.
>
> (bb) The Federal Court case of *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & another appeal* [2004] 1 LNS 52; [2005] 3 MLJ 97 where at 114-115, Gopal Sri Ram JCA also held that the Court's task is to adopt that course which will produce complete justice as between the parties and should not for a moment allow any technicality to stand in its way of achieving that end ...

[22] Thirdly, as highlighted by the plaintiff a comparison can be drawn with penal indorsements where the penal indorsement that the respondent is liable to process of execution would sometimes be included in the drawing up of the order but sometimes omitted; however the omission is not fatal as the drawn up order could be amended to include the penal indorsement as in *Tan Bee Ang v. Siew Chee Choong* [2011] 1 LNS 121 where the High Court held:

> The *Decree Nisi* was granted by Y.A. Puan Suraya Binti Othman (as she then was) on 9.9.2009. Since that time, the Petitioner claimed that she had great difficulties in enforcing the *Decree Nisi* due to the Respondent's failure to fulfil his obligations thereunder in relation to the division of matrimonial assets.

> The Petitioner then commenced committal proceedings against the Respondent ...
>
> 2. there is no indorsement of a penal notice in the *Decree Nisi* which was recorded as a Consent Order. Hence, committal of the Respondent to prison cannot be allowed in view of the requirement for such indorsement under O. 45 r. 7(4) of the Rules of the High Court 1980 ("the RHC").
>
> Consequently, the Petitioner filed enclosure 57 to apply for the necessary amendments to be made to the *Decree Nisi* so as to enable the Petitioner to enforce the *Decree* or Order.

[23] The defendant attempted to distinguish *Pasukhas* (*supra*) by submitting:

> The Defendant was present at the Kuala Lumpur High Court on 03.10.2012 and *via* its solicitors had indicated to the Court of their intention to file their application to set aside the *ex parte* Order unlike in our present case, where the Defendant, a foreign company was not present and has been deprived of their rights provided under Order 69 rule 8(8) Rules of Court 2012.

[24] In considering whether the defendant has been prejudiced as alleged, I will have to consider whether there has been inordinate delay in filing the defendant's application as the plaintiff contended.

[25] Bearing in mind the existence of the specific provision wherein the first limb of O. 69 r. 8(8) of the ROC 2012 specifies that a party may within a period of 14 days "after the service of the order giving permission to enforce the award is served", I am of the view the general provision of O. 42 r. 13 of the ROC 2012 which specifies that "[A] party intending to set aside or to vary such order or judgment shall make an application to the court and serve it on the party who has obtained the order or judgment within 30 days after the receipt of the order or judgment by him" does not apply.

[26] The plaintiff argued that there is inordinate delay of approximately one year six months on the defendant's part in applying to set aside the 16 January 2014 order. In *Abdul Latif Mohamed Ibrahim v. International Factors Leasing Pte Ltd* [2001] 2 CLJ 140 at 147 [f-i], Haidar Mohd Noor JCA (as he then was) (delivering judgment on behalf of the Court of Appeal) opined:

> This court in dealing with the delay point in *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 said at p. 401:
>
> > **It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously**. The *maxim vigilantibus*, *non dormientibus*, *jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. **Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant**.
> >
> > *In all cases in which delay in approaching the Court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable*

> *depends upon the facts and circumstances of each case*. And in a matter which involves the exercise of discretion, it is for the Judge in whom the law primarily vests the discretion.
>
> **The burden therefore falls on the appellant to render satisfactory explanation or to lay sufficient material for the court to consider the delay in making the application for an extension of time**.
>
> (emphasis added)

[27] The plaintiff also cited:

(a) In *Abdul Latif Mohamed Ibrahim* (*supra*), the Court of Appeal dismissed the applicant's appeal wherein the extension of time to set aside was only filed after three years. In the present case, there is not even any application to extend time.

(b) In *Saeed U Khan v. Lee Kok Hooi* [2000] 7 CLJ 454; [2001] 5 MLJ 416 (HC), the court held that the defendant's application or an extension of time should be dismissed on the grounds that the two years delay in filing the application to set aside the registration of the judgment was inordinate and the defendant had failed to provide sufficient reasons to justify the exercise the discretion of the court in his favour. Further, to grant an extension of time to the defendant after a two year delay would seriously prejudice the plaintiff.

However I note that in the present case there was not even an application for extension of time.

[28] In this instant case the defendant attempted to explain the reason for the delay of about one year six months in setting aside the 16 January 2014 order in the following manner:

> [T]he reasons for the delay (if any) in filing this application, was due to the fact that on 12.03.2012, the Honourable Board for the Industrial Financial and Reconstruction, New Delhi *vide* Case No.34/2011, had declared the Defendant a sick industrial company under Section 3(1)(o) of the Sick Industrial Companies Act 1965. Thus, the Defendant has to undergo corporate restructuring and financial rehabilitation. The Rehabilitation Scheme of the Defendant is yet to be finalised and implemented. However, the financial situation of the Defendant has now improved and the Defendant is able to decide in respect of incurring additional costs in filing this application as opposed to previously where the Defendant was not in a position to decide and/or that no proper decision can be made in respect of incurring additional costs.

[29] It is my respectful view that the defendant's reason for the inordinate delay being lack of finance cannot constitute a valid and justifiable reason for the defendant not to seek legal recourse within the stipulated time. In fact I am inclined to agree with the plaintiff's submission that there is no prejudice caused to the defendant : given the factual circumstances it would seem that

the absence of the indorsement under O. 69 r. 8(8) of the ROC 2012 would not matter anyway as the defendant could not incur any such costs to set aside the 16 January 2014 order nor decide at that time.

Notice Of Novation

[30] Section 38 of the AA 2005 provides:

> 38. (1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

[31] Section 39 of the AA 2005 provides the grounds for refusing recognition or enforcement of an award as follows:

> (a) where that party provides to the High Court proof that:
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) ...
>
> (iii) ...
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
>
> (v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;
>
> [(1)(a)(v) Am. Act A1395:s.8 - Prior text read - "subject to subsection (2), the award contains decisions on matters beyond the scope of the submission to arbitration;"]
>
> (vi) ...; or
>
> (vii) ...; or
>
> (b) if the High Court finds that:
>
> (i) ...;
>
> or
>
> (ii) the award is in conflict with the public policy of Malaysia.

[32] The defendant submitted:

(a) The issue of novation can be raised at this stage as the defendant is resisting the registration and enforcement of the arbitration award and cited the case of *State Government of Sarawak v. Chin Hwa Engineering Development Co* [1995] 4 CLJ 1 where at 8[a-b], the Supreme Court held:

> We agree, that in certain circumstances, a party may avail himself of a passive remedy by which is meant he does not take the initiative to attack an award, but simply waits until his opponent seeks to enforce the award by action or summary process, when he resists enforcement.

Mustill and Boyd on *Commercial Arbitration* (2nd Edn) p.546 have instanced two situations when the passive remedy would be available; namely:

1. where the award is so defective in form or substance that it is incapable of enforcement.
2. where the whole or part of the award is ineffective on the ground that the relief granted lies outside the jurisdiction of the arbitrator.

(b) On 5 December 2008 the plaintiff's agent, Messrs Saigal Sea Trade - Mumbai, India had *via* e-mail, given notice that the plaintiff (prior under judicial management), had novated the charter party in favour of Armada Shipping SA, Switzerland (exh. D8). Since COA 2008 has been novated, the plaintiff is no longer the proper party to the arbitration. It is a procedural matter that can be raised now to challenge the 16 January 2014 order and further the plaintiff is now pursuing the challenge under s. 39 of the AA 2005.

(c) Even though the plaintiff was the correct party to commence the arbitration, due to novation that occurred during the arbitration, the plaintiff had lost all their status or rights. The plaintiff has failed in their duty and/or obligation to disclose to the arbitrator in respect of the novation, especially in the instant case where the defendant did not participate in the arbitration proceeding for reasons stated in their letter dated 10 November 2008 (exh. D5) in defendant's affidavit in support. In the letter, the defendant claimed it informed the plaintiff and the arbitrator about the refusal of licence/permission by the deputy director of shipping which has further prevented the defendant in performing the COA. The defendant had further requested the plaintiff not to take any further steps under the COA, including arbitration.

(d) To allow the plaintiff to register and enforce the arbitration award would be contrary to s. 39(1)(a)(iv)/(v) or 39(1)(b)(ii) of the AA 2005 since the party (ie the plaintiff) registering the arbitration award is no longer the proper party to the arbitration award as the plaintiff, Armada (Singapore) Pte Ltd being the correct party to commence the arbitration had lost all their status and/or rights due to the novation.

[33] With regret I cannot accept the defendant's contentions for the reasons as submitted by the plaintiff:

(a) This issue of novation is, if at all, an issue of merits;

(b) Matters going into merits of the arbitration award are strictly of no relevance to the court in determining whether to allow enforcement of an arbitration award;

(c) The proper place to challenge the validity of the arbitration award should be at the seat of arbitration, ie the English court who is the supervisory court rather than in this court who is merely an enforcement court. (see *Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd* [2010] 1 CLJ 137; [2010] 2 MLJ 23).

(d) Similar contention with regard to proper party was raised in the case of *Lombard (supra)* and *Murray & Roberts Australia Pty Ltd v. Earth Support Company (SEA) Sdn Bhd* [2015] 6 CLJ 649 wherein the Federal Court and the High Court had correctly held that such contention has no relevance in the enforcement court and should be dealt with in the supervisory court at the seat of arbitration. *Lombard* ("If at all the respondent wanted to raise the issue that the respondent was not a party to the arbitration agreement this must be done in the English courts as the supervisory courts").

(e) Furthermore, the defendant would be estopped to argue this point, having chosen not to participate in the arbitration proceedings, and all the other proceedings (*OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534).

(f) Novation merely involves transfer of a debt, and not an assignment of rights.

(g) As evinced by the Court of Appeal's pronouncement reproduced below in *Puncak Alam Housing Sdn Bhd v. Menta Construction Sdn Bhd & Anor* [2013] 1 LNS 148; [2014] 1 MLJ 287, the issue of novation requires various findings such as whether there was a novation in the form of extinguishing the old contract, and substituting a new contract.

> [50] Abdul Malik bin Ishak J (now JCA) in *Mawar Awal (M) Sdn Bhd v Kepong Management Sdn Bhd & Anor* [2005] 6 MLJ 132, at p 150 made reference to 'novation' in this way:
>
> > (38) It is ideal to mention that section 63 of the Contracts Act 1950 on novation is of wider import. Indeed this was the view held by Visu Sinnadurai J in *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127; [1994] 3 CLJ 806; [1994] 3 AMR 2060 and I certainly share his view. His Lordship Visu Sinnadurai J in that case aptly said:
> >
> > > Section 63 is not limited in its scope to novation as it is understood under English Law alone, but also covers situations where the parties have rescinded the earlier contract, by substituting a new one. If there is an intention on the part of both the parties to substitute a new contract, the old need not be performed, even if the new merely alters certain terms of the old. *The test basically is this: if a new contract is entered into by the parties, whatever its terms, the old*

contract is extinguished. It does not, however, cover a situation where the terms of the old contract are merely altered or varied, without a new contract in substitution of it being entered into. In such a case, the old contract, as altered or varied, remains in force. (emphasis added)

[34] For all the foregoing reasons to reiterate I had dismissed the defendant's application to set aside the 16 January 2014 order with costs of RM10,000 and allowed the plaintiff's application to amend the sealed order dated 16 January 2014 to include a notice pursuant to O. 69 r. 8(8) of the ROC 2012.